The MLRC Digital Review

Reporting on developments in digital media law and policy

by Jeff Hermes

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The MLRC's *Legal Frontiers in Digital Media* conference is coming!

That's right, it's that time again, as the MLRC heads out to San Francisco for its conference focused on you, the lawyers with an interest in digital media law. Whether you live, eat, and breathe these issues or just realize that sooner or later *you will*, come out and join us on Tuesday, May 14th! It might just be the most exciting thing that ever happened on a Tuesday.

[DISCLAIMER: Claims regarding Tuesday not verified by research into historical events, weddings, or births of children. The U.S. Surgeon General warns that Tuesday's children may be full of grace.]

We're particularly excited to welcome Suzanne "Suzy" Wilson, the General Counsel and Associate Register of Copyrights for the U.S. Copyright Office. Apparently, there's this thing called "AI" about which we should be aware, and Suzy will be sharing the Copyright Office's thoughts on the topic. And that's just the start – check out the full schedule, and register.

Oh, and my goodness, look at the time! Your last day to get early bird pricing for registration is Friday, April 19th, which is either today or tomorrow depending on when this issue gets published – this article is out of my hands after I submit it to Jake. Point is, there's still time to save $100 on the standard registration price if you register now!

Meanwhile, I'm happy to serve up the usual report on what's been happening lately in the world of digital law, so if you want to chat knowledgably with your peers at *Legal Frontiers*, read on…

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A. Anonymity/Pseudonymity

In a remarkable ruling on an access issue, the Fifth Circuit vacated an order unsealing the record in a revenge porn lawsuit, going so far as to say that the district court should "consider whether this case merits allowing Plaintiff to use a pseudonym—even retroactively."

A magistrate judge in N.D. Cal. quashed another subpoena to Reddit from film companies seeking information about the site's users in aid of copyright enforcement, ruling that even if the subpoena was limited to users' IP addresses it still implicated anonymity interests protected by the First Amendment.

X Corp. obtained dismissal of claims in N.D. Cal. by a Saudi Arabian activist who asserted that the company collaborated with the Saudi government to unmask dissidents, with a judge finding RICO claims to be time-barred and unsupported by plausible allegations. And in M.D. Fla., we have this dramatic example of how not to protect your online anonymity when you file a complaint.

The Connecticut Supreme Court held, in a discovery action as a prelude to a defamation case, that a court order rejecting a blogger's invocation of the state's shield law and directing the parties to confer about forensic discovery was not an appealable final judgment before a discovery protocol was established.

A mineral extraction company based in Cleveland has filed suit in Ohio state court in an effort to compel Yahoo to unmask an anonymous critic; Case Western Reserve University Law School's First Amendment Law Clinic has stepped in to protect the critic's identity.

Finally, a new bill in California would force large online platforms to verify the identities of "influential" and "highly influential" users in an attempt to stem election misinformation.

B. Personal Information

Meta filed a petition for cert asking the Supreme Court to overturn a Ninth Circuit ruling that revived an investor lawsuit arising out of revelations of Cambridge Analytica's data harvesting, arguing that the Court of Appeals erroneously attributed two stock drops four months apart to the same disclosure.

Speaking of the Ninth Circuit, the Court of Appeals had a busy stretch on digital privacy issues. The Court of Appeals heard argument in two cases in which consumers sought to revive lawsuits against Apple and Google, respectively, regarding handling of personally identifiable

information related to streaming rentals – and quickly ruled for the tech companies in a combined opinion, finding that the underlying state statutes did not create a private cause of action. The Court of Appeals also heard argument in another case against Google in which plaintiffs asked the Court to reverse a holding that disclosure of data regarding their use of apps on Android phones was not highly offensive to a reasonable person. Meanwhile, the Court affirmed district court approval of a $90 million class settlement arising out of Facebook's alleged tracking of logged-out users and reversed a ruling that plaintiffs had not stated a claim against Google sounding in conversion of their cellular data.

The D.C. Circuit denied Meta an injunction pending appeal against the FTC's attempt to reopen a privacy probe into the company. The Court of Appeals also denied Meta an injunction pending appeal in its attempt to forestall the FTC from modifying its $5 billion privacy settlement with the company, accepting the reasoning of the district court in denying an injunction below and rejecting an argument that the FTC is biased against Meta as well as other constitutional challenges to the agency's actions.

We have a head-scratcher out of N.D. Cal. in which a judge ruled that the Meta Pixel's placement of cookie data onto the computer of an unwitting user of health care services could constitute common law trespass to chattels because the cookie was non-temporary and took up a non-zero amount of storage space. In a similar Meta Pixel tracking case in the same court involving tax websites, the court allowed wiretapping claims to proceed while dismissing other claims with leave to amend.

Pixel tracking of online video viewing in particular remains a hot topic. This time around, we've got: a ruling from N.D. Cal. allowing some defendants to escape a lawsuit over NBA Top Shot but allowing claims against the developer of the service to proceed; a new lawsuit in M.D. Fla. against GolfNow and NBC; a ruling out of N.D. Ill. rejecting an attempt to dismiss claims against Tubi or to send them to arbitration; new cases in S.D.N.Y. against FuboTV and MLB Advanced Media; a ruling denying GameStop's motion to dismiss a suit in S.D.N.Y.; an $8M settlement of claims against AMC in S.D.N.Y. related to tracking on its suite of streaming services; and an order out of N.D. Ohio denying motions to dismiss claims against the Toledo Blade and the Pittsburgh Post-Gazette. On a related theme, a new lawsuit in W.D. Wash. accuses Prime Video of violating the VPPA by sharing video watching habits with its Amazon affiliates.

A judge in D. Idaho denied data broker Kochava's motion to dismiss privacy claims filed by the FTC, ruling that the risk of secondary harms from Kochava's customers' use of personal data was sufficient to state a claim. Meanwhile, the FTC fined cybersecurity company Avast $16.5 million for using its antivirus software to collect user browsing data for sale, Senator Ron Wyden urged the FTC to take action to protect the 1.6 billion people whose data is held by bankrupt data broker Near Intelligence as its assets are sold off, and President Biden issued an executive order directing the DOJ and the Department of Homeland Security to take steps to block China,

Russia, Iran, North Korea, Cuba and Venezuela from obtaining information on American citizens from data brokers.

Speaking of China, TikTok is in the news again. In February, we had a bipartisan group of Congressfolk urging the Commerce Department to put ByteDance on the export control list and Republicans on Capitol Hill calling on the president to deactivate his campaign's TikTok account. Then in March, a new bipartisan bill, the Protecting Americans From Foreign Adversary Controlled Applications Act, dropped. The bill would force TikTok's Chinese corporate owner (or any Chinese, Russian, Iranian, or North Korean owner of any of a broad range of other platforms, if deemed by the president to be a national security threat) to divest itself of the platform in a sale approved by the White House for the platform to continue operating in the United States.

TikTok called on its users to protest the bill en masse, which they diligently did. But this apparently only convinced folks in Congress that the Chinese-owned company was indeed manipulating the hearts and minds of U.S. citizens, with the House Commerce Committee voting 50-0 to advance the bill. The full House passed the bill, 352-65, only days later, but the Senate doesn't appear to be moving as quickly. Resistance to the bill continues, between TikTok creators concerned for their careers, those raising First Amendment objections, and those who see action against TikTok as a distraction from (or entrenchment of) more serious data privacy problems. Vultures are beginning to circle in expectation of a sale, but current owner ByteDance is acting, for now, as if it isn't interested in that option.

The FTC ended an investigation into X Corp.'s compliance with a privacy consent order that preexisted the Musk takeover of Twitter, finding that despite Musk's orders to "take actions that would have violated the FTC's Order," "[l]ongtime information security employees at Twitter intervened and implemented safeguards to mitigate the risks." The FTC also announced an inquiry in advance of Reddit's highly anticipated IPO into the company's licensing of data for use in AI training. And perhaps most strikingly, the Commission announced that it now considers web browsing and location data to be sensitive information in all cases, even when it has been "de-identified" through removal of the traditional categories of personally identifiable information. The FTC pointed to "years of research" demonstrating that it is often possible to re-associate such data with particular individuals even after the usual types of PII are deleted.

A California appellate panel held that a trial court judge erred in ruling that regulations implementing the California Privacy Rights Act were not enforceable until a year after their finalization, rather than on the date stated in the CPRA (i.e., July 1 of last year). Also in California state court: Cali's AG settled with online food delivery platform DoorDash over claims that the site violated the California Consumer Privacy Act by failing to make it clear to users that they could opt out of the sale of their data; and a putative class action was filed against

on online adult product retailer and Google over the former's alleged sharing of consumers' sensitive information to the latter via Google Analytics.

A Florida bill would augment criminal penalties for accessing or using a digital device to monitor a person or their property without consent.

Finally, a jury in New York state court awarded $30 million in damages in a revenge porn lawsuit this month; the defendant failed to appear at trial leaving damages the only issue in the case.

C. Children's Privacy & Safety

With the Fifth Circuit having stayed a district court stay of a preliminary injunction against Texas's age verification law, Ken Paxton wasted no time in suing the companies behind Pornhub in Texas state court for failure to comply with the law. (Cool, Ken, way to go helping the Supreme Court to avoid those questions about state court interpretations of state law that popped up in the *NetChoice* oral arguments – about which more below.) Pornhub cut off Texas from its services in response, while Texas went on to sue two other adult website operators.

Shortly thereafter, the Fifth Circuit issued an opinion flipping the lower court injunction with respect to the law's age-verification provisions but upholding it as to mandatory health warnings required by the law. Here's Prof. Goldman explaining how the Court of Appeals twisted itself in knots to avoid Section 230, *Reno v. ACLU*, and *Ashcroft v. ACLU*, and here are the plaintiffs seeking cert to allow the Supreme Court to decide whether it will stand up to these shenanigans.

Meanwhile, the Tenth Circuit heard argument in March on the Free Speech Coalition's appeal of the dismissal of its constitutional challenge to Utah's age-verification law. The district court dismissed the case on the basis of the Eleventh Amendment, finding that *Ex parte Young* did not apply because the statute relies on a private attorney general scheme for enforcement; the plaintiffs argued on appeal Utah's state attorney general could still enforce the law through his role in opining on statutory questions. The issues may further be complicated by Utah's passage of new laws requiring age verification for social media and feature limitations for minor users, which were rushed through the legislature in an attempt to evade an earlier constitutional challenge to a prior version of these laws. (Utah also passed another law requiring that digital devices sold in the state come with adult content filters activated.)

A judge in W.D. Ark. allowed limited discovery over NetChoice's objection in a pending challenge to Arkansas' age verification law, stating that the court would consider summary judgment after the state has an opportunity to build a record on whether the law is narrowly tailored by targeting platforms "that cause the most harm."

In N.D. Cal., Judge Yvonne Gonzalez Rogers heard argument on social media companies' motion to dismiss consolidated multidistrict litigation in which schools have accused the defendants of harming students with the addictive features of their platforms, and postponed ruling on whether the platforms have a jury trial right as to certain consumer protection claims filed by state AGs pending a Supreme Court ruling that might address the issue. Meanwhile, the City of New York has sued a suite of social media companies in Los Angeles Superior Court (?!), asserting New York common law public nuisance, negligence, and gross negligence claims based on allegations that the platforms created a mental health crisis among teenagers.

A putative class action in N.D. Cal. alleges that online game platform Roblox has targeted minors with, and profited from, offering an in-game currency that third-party gambling operators have been allowed to use like casino chips.

In S.D. Ohio, a judge issued a preliminary injunction against the enforcement of an Ohio law requiring parental consent for minors' use of social media services, following up on a TRO from January and finding that the law impaired the First Amendment interests of both platforms and children without passing strict scrutiny.

In a prosecution involving charges of transmission of sexually explicit images of a minor by a minor, the Pennsylvania Supreme Court held that exposure of the female breast below the top of the nipple was sufficient to constitute "nudity" under the relevant statute, even if the nipple itself is not exposed. Well, glad we've got that settled.

In Congress, you might recall that the Kids Online Safety Act (better known as KOSA) faced criticism in part for its delegation to individual state AGs the discretion to designate content as inappropriate for minors. A revised KOSA reducing state AGs' role has now been introduced, but has not assuaged the concerns of all critics. Meanwhile, Sen. Mike Lee has introduced the Preventing Rampant Online Technological and Criminal Trafficking (PROTECT) Act and the Shielding Children's Retinas from Egregious Exposure on the Net (SCREEN) Act; the former would impose new burdens on platforms to verify the ages of individuals appearing in sexually explicit images and the latter would create national age verification requirements for platform users. And finally, Sen. Ron Wyden blocked an end run attempt by the sponsors of EARN IT and STOP CSAM, who sought unanimous consent for the bills from the Senate floor on a Wednesday evening.

In Arizona, a state rep has introduced a local version of the problematic Protecting Children on Social Media Act that's kicking around Congress.

Florida's House passed a ban on social media for users under 16 along with age verification requirements; however, the state's senate focused on a revised version that would implement the same ideas but lower the ban age to under 14 (with parental approval required for 14- and 15-year olds) and change the criteria for determining which platforms are covered. Florida Gov.

DeSantis vetoed the first version and voiced support for the second, which then passed and which DeSantis signed. The new bill also requires age verification for adult content sites, and Pornhub's operator is preparing to geoblock Florida when and if the law actually goes into effect.

Not to be upstaged, Kansas' legislature passed a bill requiring age verification that users are over 18 on sites with more than 25% content that is "harmful to minors," with underlying state law defining such content to include "acts of homosexuality." Ugh. Kentucky also has a new bill requiring parents to verify children's ages before kids can open accounts, as does New York. One more time: Age verification to protect kids means age verification for *everyone* because you can't tell a priori who is a child attempting to open an account, and that means everyone is sharing more personal data with platforms or their age verification vendors. Unless, of course, AI renders the whole process futile.

D. Rights of Publicity

In N.D. Cal., a judge denied DeviantArt's anti-SLAPP motion against ROP claims brought by artists over the use of their names to promote its AI-image generation tool DreamUp, finding that the category of claim brought by the artists fell within the "public interest" exception to California's anti-SLAPP law despite the fact that the claims were deficient on the pleadings.

A judge in D.R.I. held that the insurer of an adult entertainment club could not invoke a policy exclusion that was broad enough to swallow the entire coverage to avoid paying a consent judgment in a lawsuit filed by models over the unauthorized use of their images in the club's advertising.

Tennessee Gov. Bill Lee signed a new law, the ELVIS Act, amending the state's right-of-publicity law to provide (1) specific protections against exploitation of voices using artificial intelligence and (2) that the post-mortem ROP continues indefinitely unless, at some point after ten years have passed since the death of the individual, the commercial exploitation of the right (which is trivially easy to continue) lapses for a period of at least two years.

I have issues with post-mortem rights of publicity because they are weakly justified by the privacy interest of the individual, who isn't around to worry about it (similar to how you can't defame the dead). Even when conceived of as a quasi-intellectual property right, post-mortem rights only make sense when limited in time, as with copyright terms. An infinite post-mortem right reflects no kind of rational evaluation of the necessary incentive for a performer to develop their skills.

E. Biometrics

The Ninth Circuit heard argument in a BIPA case this month, as a plaintiff sought to reinstate his claim against Meta over the platform's alleged storage of an image of his face. A judge in N.D. Cal. overruled Meta's choice-of-law provision in its products' terms of service to hold that Illinois, not California, law applied to an Illinois' woman's BIPA claim, while a different judge in the same court found that a matchmaking site hadn't proven that the plaintiff in a BIPA claim assented to the site's arbitration clause, and a third judge in N.D. Cal. held that would-be BIPA plaintiffs failed to allege that Google engaged in relevant conduct in Illinois when it used an IBM photo database to improve its facial recognition products.

That's a lot of discussion of Illinois law in California, no? But a legislative amendment under consideration in the Land of Lincoln would slash damages available under BIPA by counting the repeated unauthorized collection of biometric data from the same person in the same manner as a single violation.

F. Manipulated Media

Two middle school students in Florida have been criminally charged in state court for sharing AI-generated nudes of their classmates, while a New Jersey high school student filed a lawsuit in D.N.J. against another student for the same act. State legislatures are churning out bills on the issue of AI deepfakes at a breakneck pace – much faster than your humble chronicler can cover in detail – while a coalition of individuals working on AI issues called on Congress to pass national legislation.

G. Hacking, Scraping & Data Breach

X Corp. trimmed but did not fully escape a putative class action in N.D. Cal. accusing it lapses in security leading to the hack of 200 million users' data, while a judge in C.D. Cal. dismissed an investor lawsuit against X Corp. over allegedly misleading statements during the Twitter years regarding data security concerns. Meanwhile, in N.D. Cal., a judge ruled that X's breach of contract lawsuit against the Center for Countering Digital Hate for scraping X data was a SLAPP in retaliation for the Center's speech, and that X's CFAA claim should also be dismissed. Prof. Goldman notes some interesting maneuvers by the court to disregard certain harms alleged by X in order to justify the dismissal.

Elsewhere in N.D. Cal.: Meta is walking away from scraping claims against Bright Data after an adverse ruling in January; a judge has ordered spyware company NSO Group to turn over source code to WhatsApp in the latter's lawsuit over use of the infamous Pegasus spyware against WhatsApp users; a similar lawsuit filed by a news service in El Salvador against NSO was kicked out for lack of jurisdiction; and a security researcher has been indicted for hacking Apple to scam the company out of more than $2 million in merchandise.

A Tampa resident who previously worked for the Daily Beast and produced content for various news sites has been indicted in M.D. Fla. for hacking to gain access to unaired Fox News/Tucker Carlson video and leaking the video online. First Amendment groups and others have raised concerns over the prosecution, although there is some debate as to whether the defendant is a current or former journalist and whether the distinction matters.

A federal agent secured summary judgment in D. Md. against claims that he gained unauthorized access to a former CBS journalist's computer. The operator of worldwide library database WorldCat has sued library search engine Anna's Archive in S.D. Ohio for allegedly scraping its records. Seven defendants have been indicted in E.D.N.Y. in connection with a 14-year Chinese government campaign to hack U.S. businesses. And in S.D.N.Y., former CIA employee Joshua Schulte was sentenced to 40 years in prison for leaking classified information, as well as on child pornography charges.

In other news, the FTC has ordered software provider Blackbaud to revamp its "reckless" security practices that allowed a massive data breach, the White House announced new visa restrictions on people convicted of the misuse of commercial spyware, Google called for stronger regulation of spyware and warned that NSO Group is hardly the only purveyor of the tech, and 41 state attorneys general demanded that Meta do more to support users who have been locked out of hacked accounts.

H. Other Privacy Issues

Following a Swedish ruling that Google's informing publishers of right-to-be-forgotten removals of their content from search results is itself a privacy violation, Google has ceased sending detailed notifications globally. Instead, the company now sends a bare notice simply stating that an unidentified URL has been removed.

II. Intellectual Property

A. Copyright

The Supreme Court heard argument in late February in *Warner Chappell Music v. Healy*, involving whether the discovery rule applies to allow for damages beyond the Copyright Act's three-year statute of limitations. However, several justices questioned whether it was proper to resolve the question before resolving in another pending case whether the discovery rule applies to copyright claims at all.

A coalition of religious broadcasters has petitioned for Supreme Court review of a D.C. Circuit decision rejecting claims of religious discrimination in the Copyright Royalty Board's latest increase in webcast royalty rates, while the operator of a controversial online forum has sought

cert on a Tenth Circuit opinion involving issues arising from its receipt and handling of a DMCA takedown notice.

The Second Circuit heard argument on a stream-ripping service's appeal from a ruling that its service violates the Copyright Act, and received heavyweight amicus briefs in support of book publishers' lawsuit over the Internet Archive's digital library.

In the Fourth Circuit, a photographer won his appeal from the dismissal of his claim against a news site over the unauthorized use of a pic of Ted Nugent. The Fourth Circuit also flipped a vicarious liability judgment against internet service provider Cox Communications for user infringements while leaving a verdict of contributory infringement intact, and remanded for recalculation of damages; the court subsequently denied cross-petitions for rehearing.

The Fifth Circuit reinstated DISH Network's piracy claims against an Arabic video website, finding that the district court erred in its determination that the German operator of the website was not subject to jurisdiction in the United States. The Eighth Circuit heard argument on whether a politician's use of a meme in a fundraising missive was fair use, as seen through the lens of *Warhol*. The Eleventh Circuit held that a real estate broker sued for use of an aerial photography company's photograph was not a prevailing party for fee-shifting purposes after the plaintiff was allowed, over the broker's objection, to dismiss its case voluntarily without prejudice. And the D.C. Circuit received briefs in two interesting copyright cases from the federal government this month, one opposing the reinstatement of a constitutional challenge to the DMCA's anti-circumvention provisions and one opposing the reinstatement of a computer scientist's claim that AI-created works are eligible for copyright protection.

A judge in N.D. Cal. held that a group of authors behind three copyright lawsuits against OpenAI failed to plead viable claims for vicarious infringement based on ChatGPT outputs, violation of the DMCA's prohibition on removal of copyright management authorization, unjust enrichment, or any of a variety of unfair competition claims. The court found, however, that the plaintiffs could proceed on a narrow unfair competition claim (that it was "unfair" for the defendants to use plaintiffs' copyrighted works to train their language models for commercial profit) and allowed amendment as to the other claims. Also, OpenAI did not move to dismiss a direct infringement claim, which remains pending. In a separate order, the judge denied the plaintiff authors' motion to defend a similar action filed against the defendants by the Authors Guild in the Southern District of New York.

Meanwhile, a separate author lawsuit in N.D. Cal. alleges that an AI platform operated by chip manufacturer Nvidia was unlawfully trained on a data set that included their books. And we'll jump ahead briefly to S.D.N.Y. to note the filing of motions to dismiss by OpenAI and Microsoft in the New York Times' infringement lawsuit, and new lawsuits filed by The Intercept, Raw Story and AlterNet against OpenAI.

Elsewhere in N.D. Cal., plaintiffs behind a putative class action against Meta Platforms over embedded content have voluntarily dismissed their claims. In C.D. Cal., Epic Games settled with famous choreographer Kyle Hanagami over the latter's claim that Epic included Hanagami's copyrighted dance moves in its game "Fortnite" without permission, and the operators of short-form video platform Likee secured dismissal of music publisher BMG's direct infringement claims based on user infringement (though contributory infringement claims survive). In E.D. Mich., online printshop Sunfrog evaded claims based on users' alleged infringement of the plaintiff's illustrations of fish.

We've got the usual plethora of activity in S.D.N.Y., beyond that mentioned above:

- A judge entered a default judgment against a social media user who retweeted a post in which an allegedly infringing image was embedded, elevating the violation to willful infringement because the defendant responded to a takedown demand with an "obscene tirade." Huh.

- Textbook publishers sought a default judgment and injunction against an online "shadow library" that offers digital copies of their content for free.

- Amazon defeated an infringement action over its streaming of a Chinese TV show on Prime Video, obtaining summary judgment on the basis that an agreement that purportedly gave the plaintiff the distribution rights that were allegedly infringed was never fully executed and therefore void.

- A judge largely refused to dismiss copyright and cybersquatting claims brought by a data scientist against a non-profit focused on police violence arising out of the unauthorized use of the former's work.

- Barstool Sports is facing a new lawsuit from a videographer over its use of video from a 2021 Colorado wildfire.

- And finally, in S.D.N.Y. bankruptcy court, a judge has allowed a suit against ISP Frontier Communications over user infringement to proceed.

What else…well, in D.R.I., we've got a ruling that "reaction videos" posted to YouTube incorporating clips from a podcast were a fair use. Makes sense, but as with all things fair use, the specific details matter. We've got a couple of developments in music cases out of M.D. Tenn., no surprise, with the Mechanical Licensing Collective suing Pandora over what it claims to be unusually low streaming royalties, and music publishers failing to convince a judge that transmission of musical works by users of X creates direct liability for X under *Aereo* (though narrowed theories of contributory liability survived). In N.D. Tex., Sony Music scored an $800K judgment against a TikTok rapper for infringement of a Japanese composer's 1986 track. In

W.D. Tex., a photographer won summary judgment on liability against a bar in El Paso that used his photos in its Facebook promotions without permission. And in W.D. Wash., game developer Bungie obtained summary judgment against a YouTuber who posed as a Bungie employee and filed ninety-six fraudulent DMCA notices with YouTube to take down Bungie-related content (apparently in retaliation for Bungie's issuing a takedown notice for a video posted by the defendant); the parties subsequently settled.

We'll end this section by announcing that copyright plaintiffs' counsel Richard Liebowitz has been disbarred by the State of New York. No comment from me on this one.

B. Trademark

The Supreme Court denied cert in *Y.Y.G.M. v. Redbubble*, in which a fashion brand sought review of a 9th Circuit ruling in favor of an online print shop with respect to the scienter requirement for trademark liability.

Speaking of fashion, the trademark dispute between my namesake fashion brand and an NFT artist continues at the Second Circuit, with the latter filing a reply brief arguing that *Rogers* protects his "MetaBirkins" NFTs. In another case, the Second Circuit affirmed a bench trial verdict that "Jackpot.com" does not infringe the trademarks of lottery app Jackpocket.

In the federal district courts… Peloton fought off a reverse-confusion trademark case filed by a lesser-known app developer in N.D. Cal. over its mark "Bike+", with the judge finding this to be a "rare" case where the defendant overcame the presumptive distinctiveness of the plaintiff's registered mark with evidence of descriptiveness. In C.D. Cal., a magistrate judge denied summary judgment for the USPTO in Snap's challenge to the Office's refusal to register the mark "Spectacles" for Snap's VR glasses. The Frida Kahlo Corporation, holder of the trademark rights in the famous artist's name and likeness, filed suit in N.D. Ill. against online sellers of alleged counterfeit goods. A judge in W.D. Mich. denied online print shop Pixels' motion to dismiss trademark claims by an artist over the unauthorized sale of products tagged with his name. A magistrate in E.D.N.Y. awarded over $1 million in fees to Spotify subsidiary Gimlet Media after it defeated a trademark lawsuit over its "Reply All" podcast. In S.D.N.Y., the Supreme Court's decision in *Taamneh v. Twitter* led a judge to reconsider and to vacate his ruling that algorithmically-generated advertisements from an online marketplace for allegedly infringing third-party products are enough to establish knowledge that the marketplace was assisting infringement. Apple sued the USPTO in E.D. Va. over its refusal to register its marks "Reality Composer" and "Reality Converter" for augmented reality tools.

OpenAI obtained an injunction in California state court against a man who opposed the registration of "OpenAI" on the basis of the man's alleged "Open AI" mark, with the court finding that OpenAI was likely to succeed on its infringement claim. Meanwhile, the USPTO has refused to register OpenAI's "ChatGPT" mark.

C. Patent

Lots of activity at the Federal Circuit this issue. We've got…

- …an affirmance of the denial of plaintiffs' motion for a new trial in a case against Sony Interactive over patents for lighting in computer graphics,
- …a reversal of a defense judgment in a case against Comcast over voice recognition tech, with the Court of Appeals finding that the lower court misconstrued claim terms,
- …a denial of a writ of mandamus seeking to stop the USPTO from reexamining patents that were the subject of a lawsuit against Roku,
- …an affirmance of a lower court judgment that patents for playlist generation which Pandora allegedly infringed were directed to unpatentable subject matter,
- …an affirmance of a PTAB ruling in an inter partes review initiated by Netflix that a distributed computing patent is valid, and
- …a denial of a writ of mandamus seeking compel the transfer from W.D. Tex. to N.D. Cal. of a case against Apple over transaction security patents.

The long-running IP lawsuit in N.D. Cal. between digital FX company Rearden and Disney over motion capture technology staggers onward like a pre-Super-Soldier Serum Steve Rogers after taking one too many body blows. In the latest, the court dismissed Rearden's copyright infringement claims (involving alleged copying of its software) from the Third Amended Complaint with leave to amend, but denied Disney's motion to dismiss Rearden's patent claims.

Following a loss at trial in C.D. Cal. last year in a case involving a wireless technology patent, Netflix's attempt to flip the verdict was denied and it was ordered to pay the plaintiff's attorneys' fees.

Sony won summary judgment in a case in D. Del. accusing its PlayStation consoles of infringing a data transmission patent.

A video game technology company voluntarily dismissed its lawsuit in E.D.N.C. against French game developer Ubisoft.

A jury for W.D. Tex. found that Cloudflare did not infringe patents for hardware-based router technology with its cloud-based software services. Notably, Cloudflare attributed its win to its "Project Jengo" crowdsourcing initiative, which offers bounties to independent researchers to locate prior art. Google wasn't as lucky, with a jury in the same court awarding an app maker $12 million after finding that Google Voice infringed the plaintiff's voice-over-internet patents.

Meanwhile, Meta has escaped W.D. Tex. after Judge Alan Albright overruled the plaintiff's objections to a magistrate order transferring a patent lawsuit to the Northern District of California.

The USPTO has issued guidance regarding the patentability of AI-assisted inventions, warning that the inventorship analysis should focus on human contributions and that a natural person must make a "significant contribution" to the invention.

Finally, the Judicial Conduct and Disability Committee denied Judge Pauline Newman's appeal from a ruling of the Judicial Council of the Federal Circuit that Judge Newman committed misconduct by refusing to undergo a medical examination to determine her ability to continue in her position. Meanwhile, a judge in D.D.C. dismissed six out of eleven claims in Judge Newman's affirmative lawsuit seeking reinstatement; the judge also commented as to the remaining claims (as to which the defendants had not sought dismissal) that Newman is unlikely to prevail.

D. Trade Secrets/Misappropriation/Conversion

We've got two cases of ex-Big Tech employees facing legal action after allegedly making off with their former employers' AI trade secrets. First, a former Google engineer was indicted in N.D. Cal. for stealing artificial intelligence information to benefit two companies in China. Then, Meta sued a former vice president in Cal. Super. on allegations that he stole trade secrets to launch his own AI company.

III. Platform Management

A. Section 230

The Supreme Court denied cert in *King v. Meta Platforms*, in which the Ninth Circuit granted Meta a win in a content removal lawsuit on the basis of Section 230. Meanwhile, in a case that avoided en banc review at the Fifth Circuit by a single vote, a new petition asks the Supreme Court to review the application of Section 230 to a claim that Snapchat's negligent design allowed an adult to groom and to sexually abuse a high school student.

In a case against Apple over an allegedly fraudulent cryptocurrency app sold through the App Store, the Ninth Circuit largely affirmed a Section 230 win for Apple on multiple claims (including, puzzlingly, on an ECPA claim), but reversed as to a handful of state consumer protection claims based on Apple's own representations regarding the safety of third-party apps available on its store.

In S.D. Cal., a ringless voicemail company (i.e., a service that allows people to dump voicemails into your inbox without your phone ringing, which is a great way never, ever, to reach me,

because I never use the phone in my shared office on the days when I'm working there and certainly never look at the little red light) successfully invoked Section 230 to fend off an FTC action. In S.D. Fla., a boat rental marketplace avoided liability under Section 230 for a boating death. And in M.D. Tenn., a judge reached the (hopefully unsurprising) conclusion that Section 230 has nothing to do with a defendant's offline distribution of content, even if the plaintiff had separately posted that material online.

In state court, a California appellate panel affirmed the Section 230 dismissal of most claims against YouTube arising out of third-party cryptocurrency scams on the platform, but held that plaintiffs might evade Section 230 with a claim that YouTube's alleged grant of verification badges to popular users' hijacked channels contributed to the scams. A Connecticut judge granted Meta's Section 230 motion to strike a complaint asserting that Snapchat design defects allowed sexual predators to connect with a 12-year-old; an amended complaint was filed at the beginning of March. A New York judge, on the other hand, handwaved away a Section 230 motion to dismiss from Google and Reddit on claims that their platforms helped to radicalize the shooter in a 2022 mass murder, while leaving open the chance for the defendants to prove later that "their platforms were mere message boards and/or do not contain sophisticated algorithms thereby providing them with the protections of the CDA and/or First Amendment." Er, what?

I mentioned up under Children's Privacy & Safety an attempt to sneak EARN IT and STOP CSAM through the Senate on "unanimous consent" by a mostly empty chamber. That wasn't the only recent attempt to ram STOP CSAM through, however, and the Senators making these attempts have continued to put forward some very confused statements about the law being needed because of Section 230. Let's all recall that knowingly hosting child sexual abuse material is illegal under federal criminal law, which Section 230 does not preempt.

B. Elections & Political Advertising

The Yale Media Freedom and Information Access Clinic filed an amicus brief at the Second Circuit in February, arguing that 18 U.S.C. § 241 permits the prosecution of a social media user for attempting to deceive voters into using invalid methods to vote and that such a prosecution is consistent with the First Amendment.

The Texas Ethics Commission is considering a rule that would compel social media influencers to disclose when they have been paid for politics-related posts.

Social media and AI companies are ramping up efforts to respond to AI-generated disinformation and misinformation ahead of this fall's elections.

C. Content Moderation

So, the Supreme Court finally heard argument in the major pending cases on social media moderation.

In February, we had the arguments in *Moody v. NetChoice* and *NetChoice v. Paxton*. You'll recall, I'm sure, that these cases raise the question of whether state governments can override platform decisions to moderate user-posted material; in the case of Florida in *Moody*, the law protects particular posters and subject matter, while in the case of Texas in *Paxton*, the law forbids viewpoint discrimination.

I have an extended breakdown of the *NetChoice* arguments in the MLRC's MediaLawLetter. The short-short version is that several members of the Court got hung up on the breadth of the Florida statute on NetChoice's facial challenge and the possibility that it might have some constitutional applications, but with respect to the Texas law a majority of the justices seemed to accept NetChoice's arguments.

There are plenty of other takes out there if you want them, but most seem to agree that we'll see a narrow ruling in *Moody*, possibly upholding the district court injunction as to core content moderation activity but remanding to sort out other applications, while a broader ruling is possible in *Paxton*. I also want to call out the noble effort made by our friend Clay Calvert to summarize the numerous amicus briefs filed in the case.

Then in March we had the oral argument in *Murthy v. Missouri*, in which plaintiffs are seeking to curb the Biden administration from leaning on social media platforms to moderate user content that the administration perceives to be misinformation or disinformation. The overall consensus seems to be that the Court is very reluctant to interfere with the White House's ability to communicate with social media platforms on matters of policy, a view with which the FBI apparently agrees given that it has resumed talking to tech companies after a period of abstinence. However, Prof. Volokh teases out some potential contradictions in allowing systemic government efforts to suppress disfavored messages on private platforms in a way that it could not do on government property. The argument was also affected by apparent disinformation within the plaintiffs' briefing, as well as questions whether the plaintiffs could actually establish standing by tracing their alleged injuries to government coercion and whether injunctive relief was appropriate.

On that latter point, allow me to repeat something I've said before: If the executive branch does unconstitutionally coerce a private platform to censor third party speech, the platform is as much of a victim as the third party (that's really what *NetChoice* is about, from a compelled speech perspective). The solution is not for *another* branch of the government, the judiciary, to force the private platform to do the opposite of what the executive wanted – that's just compounding the problem. *See Carlin Communications v. Mountain St. Tel. & Tel.*, 827 F. 2d 1291, 1296-97 (9th

Cir. 1987) ("[T]he initial termination of Carlin's service was unconstitutional state action. It does not follow, however, that Mountain Bell may never thereafter decide independently to exclude Carlin's messages from its 976 network. It only follows that the *state* may never *induce* Mountain Bell to do so.") (emphasis in original). Rather, the solution is for everyone to back off, assure the private platform that it's not going to be penalized for its choices, and then let matters take their course.

Ultimately, it seems unlikely that the Supreme Court will permit any of the heavy-handed efforts to control content moderation reflected in these cases to proceed unaltered, but as always there is room for hedging and half-solutions that will muddy the analysis going forward. One justice to whom to pay particular attention on these issues is Justice Jackson, who in both *NetChoice* and *Murthy* seemed open to arguments that speech could be suppressed or compelled by the government in order to serve some other interest (antidiscrimination in *NetChoice*, maintaining the secrecy of classified information in *Murthy*).

But all else aside, the justices did deny cert in *Rogalinski v. Meta Platforms*, another content removal action out of the 9th Circuit.

The Tenth Circuit affirmed the dismissal of a lawsuit against an online marketplace arising out of a double murder that occurred when a seller on the site attempted to rob two buyers. The Court of Appeals ruled on the underlying merits of the plaintiffs' negligence and other claims without considering Section 230.

A judge in D. Ariz. denied a defense motion to dismiss the prosecution of former executives at Backpage as a result of the government's disclosure of new documents at the end of last November's trial, ruling that defense counsel were aware of some information contained in the documents and that any new information was not material to the defense of the case.

In N.D. Cal.: Ken Paxton narrowly evaded a preliminary injunction in a suit by Yelp to block Texas's threats to the platform over its consumer warnings regarding "crisis pregnancy centers" that do not offer abortion-related services; a judge held that alleged Congressional activity on an issue did not transform YouTube into a state actor for its removal of content on that issue; and Match Group was sued over the allegedly addictive gamification of its dating apps (which plaintiff claims string users along for profit while delaying actual matches).

YouTube secured summary judgment in D. Conn. against a contract claim over its alleged acquiescence to takedown demands from the Chinese Communist Party. Meanwhile, in E.D. La., Robert F. Kennedy Jr. won an injunction against the Biden administration's alleged attempt to suppress his statements regarding vaccines, but the injunction was understandably stayed pending the ruling in *Murthy*.

Snap is facing a new lawsuit in Nev. Dist. alleging that the company facilitated a 20-year-old's acquisition of counterfeit drugs made with fentanyl, leading to her death. Meanwhile, TikTok, Meta, and New York's Metropolitan Transportation Authority have been sued in New York state court over the death of a teen killed while "subway surfing" as a social media stunt.

Rep. Jim Jordan claims to have discovered a smoking gun showing the Biden administration leaning on Amazon to delist books containing COVID disinformation. The DOJ is reportedly investigating Meta Platforms to determine whether its services facilitate or profit from illegal drug sales.

Facebook's Oversight Board found that the site's rules did not prohibit an altered video suggesting President Biden is a pedophile, while also suggesting that Meta clear up its "incoherent" policy on that issue. The Oversight Board also dinged Meta for excessively removing content referring to the word "shaheed," which the Board said is not "always and only as the equivalent of the English word martyr." Meanwhile, the Board has expanded its reach to Meta's new Threads platform.

D. Terms of Service & Other Contracts

The Supreme Court heard argument at the end of February in *Coinbase v. Suski*, involving dueling terms of service for a cryptocurrency exchange between its standard user agreement and special sweepstakes rules – but a major concession by the customers' counsel seemed to presage a quick resolution of the case.

Beyond that, we've got the usual batch of thums-up/thumbs-down decisions on whether arbitration clauses in terms of service are enforceable: 9th Cir., e-commerce websites in data breach cases, thumbs up; S.D. Fla., video website in VPPA case, thumbs down; N.D. Ga., local news website in VPPA case, thumbs up; N.D. Ill., Tubi in VPPA case, thumbs down.

IV. Other Content Liability

A. Defamation

Given that this is 2024, a large (and I perceive still increasing) percentage of the defamation cases that we come across here at the MLRC arise in the context of digital media. However, only a relatively small fraction of developments in those cases actually involve interesting questions arising out of the fact that the publication is digital in nature. In order to keep this section manageable and focused on digital media law issues, from here on out I'm not going to cover every development I see that involves an online publication or digital technology, only those where the digital aspects might make a difference.

So, for example: a libel suit dismissed on an actual malice analysis that is agnostic as to the medium, out; a libel suit dismissed because a statement is made in the rough-and-tumble of social media and therefore more likely to be interpreted as opinion, in. Make sense? We'll see how it goes.

The Fourth Circuit affirmed a ruling that Donald Trump, Jr.'s reposting of a comment including a link to a CNN article was not evidence that he had read the linked article, which would have informed him that calling the plaintiff a felon when he was a misdemeanant was false; thus, there was no evidence that Don Jr. acted with actual malice.

A judge in N.D. Fla. held that a lawyer's amended lawsuit against an online influencer, including defamation, cyberstalking, online harassment, and related claims, would survive a 12(b)(6) motion to dismiss for failure to state a claim, but was a shotgun pleading in violation of Rules 8 and 10 and needed to be re-pled in its entirety. A second amended complaint followed.

A Kansas man has sued U.S. House Rep. Tim Burchett in D. Kan. for allegedly accusing him on X of being involved in a shooting in Kansas City.

A judge in D. Mont. ruled that a Montanan's use of social media to accuse a brawler in a Montana bar of racist comments was not sufficient to override other facts counseling the application of Washington state law (including its anti-SLAPP law) to the brawler's defamation claim. However, the court found that incident was not a matter of public concern, and so the anti-SLAPP law did not apply. Nevertheless, the court dismissed claims against a corporate defendant, as to which there was no evidence that it authorized the poster's social media activity, and against the poster, in part because postings on social media are more likely to be interpreted as opinion.

RFK Jr.'s lawsuit in D.N.H. against a journalist over a three-year-old online article was dismissed for lack of any significant connection to New Hampshire. The court held that it was not sufficient to establish jurisdiction that the article was available in the state when published, while the single publication rule as applicable to online content forestalled an argument that the article might have greater impact in New Hampshire after the plaintiff announced his presidential campaign. I don't know that I've ever seen the single publication rule used this way…but I like it.

Also in D.N.H., a Catholic website agreed to remove an online article critical of a priest and pay $500K to settle the case. The website announced thereafter that it would be shutting down.

In N.D. Tex., Media Matters for America has moved to dismiss X Corp.'s product disparagement lawsuit over its reporting that X sometimes places advertising alongside extremist content. In related news, a judge in D.D.C. appeared uncertain about whether the court had jurisdiction to enjoin Ken Paxton's bullshit consumer protection investigation into Media Matters' reporting on

X (though he did note that Paxton's effort appeared to be a "proxy defamation case" subject to *Times v. Sullivan*), while Missouri's AG has gone Paxton with its own consumer protection suit against Media Matters. [LATE UPDATE: Judge Mehta in D.D.C. has enjoined Paxton's investigation.]

A California appellate panel held that a student's defamation lawsuit arising out of a wave of cyberbullying should survive an anti-SLAPP motion. In another California case, another appellate panel held that the defendant's failure to remove an allegedly defamatory Facebook post for a length of time, after her receipt of reliable evidence of falsity, could be sufficient evidence of actual malice to forestall an anti-SLAPP motion. In California Superior Court, the operator of a parody Twitter account defeated a defamation claim, with a jury finding that his posts were not factual in nature. Also in California state court, a judge found that Leah Remini's long-running and open feud with the Church of Scientology made her defamation lawsuit against the Church one involving a public issue for the purpose of the state's anti-SLAPP law; the judge went on to strike particular claims from the lawsuit, including by applying the single publication rule to certain online statements.

After the long-running case finally came to trial, a jury in D.C. Superior Court awarded climate scientist Michael Mann $1 million on his defamation claims against two bloggers over their criticism of his work.

Carole Baskin, who became famous (or infamous) from her appearance in Netflix's *Tiger King*, sought reconsideration at the Florida Supreme Court of an earlier rejection of her petition from an appellate opinion that her YouTube and other online activity did not entitle her to special protections for media defendants under Florida law. Meanwhile, a Florida bill introduced by a Republican that would have eased defamation standards for plaintiffs and created new false light liability for use of artificial intelligence has died, in part because of fears of how it would be weaponized against conservative online speakers. Which, right! Glad folks in Florida remembered that legislation like this won't only be used against one's political rivals.

Finally, a new lawsuit in New York state court accuses a woman of inflicting emotional distress by using her Facebook network to spread her son's allegations about sexual abuse by a babysitter.

B. Commercial Speech

The SEC has opposed Elon Musk's petition for cert to the Supreme Court in a case seeking to void Musk's agreement with the Commission to have a lawyer vet his social media posts about Tesla.

The Ninth Circuit affirmed the certification of a class seeking damages from Meta Platforms for allegedly misrepresenting the "potential reach" of ads on its services, while vacating certification

of a class seeking injunctive relief. In a similar case, a judge in S.D. Ill. held that a local advertising company had standing as a competitor of Meta Platforms to assert Lanham Act claims against Meta over alleged false marketing of its advertising reach; the court also found that the plaintiffs' claims survived a motion to dismiss on the merits and fell outside the scope of Meta's arbitration clause.

Elon Musk has been ordered by a judge in N.D. Cal. to testify before the SEC in its investigation of whether Musk violated securities laws in connection with his statements about his purchase of Twitter. In C.D. Cal., video game company Riot Games is facing suit over its alleged role in promoting the imploded cryptocurrency exchange FTX, while a social media influencer sued by the SEC for pumping up his followers to inflate penny stocks was whacked with more than $900K in fines. In D.D.C., the FTC secured a stipulated injunction and monetary judgment against two software developers who used pop-ups to trick people into downloading bogus antivirus tools. In S.D. Fla., the SEC sued the boss of a digital ad firm for misleading the public on social media in an attempt to inflate the company's value. In S.D.N.Y., a New York AG lawsuit alleging that Sirius XM engages in deceptive practices to retain its subscribers was remanded to state court (though the reasons for the remand remain a mystery for now), while in another case a video streaming company secured dismissal of a lawsuit over its alleged false representations that it was going to pivot to become a blockchain network (crypto tokens and all). In E.D. Pa., a Lanham Act claim over a Glassdoor review of an employer was kicked out, because employee reviews of an employer aren't commercial speech. Duh. A DOJ lawsuit in S.D. Tex. against Twitter and Discord users involved in an alleged "pump and dump" stock scheme was dismissed for lack of allegations of a "scheme to defraud." A judge in W.D. Wash. held that Amazon.com did not have false advertising claims against defendants who allegedly lied their way into being allowed to sell on the site because the misrepresentations were not commercial statements to a competitor or a consumer, while another judge in the same court held that certain claims that Amazon misrepresented licenses of digital content as purchases should survive a motion to dismiss.

Over in state court, South Dakota Gov. Kristi Noem has been sued in D.C. Super. for allegedly promoting dental services without disclosing that she is a paid influencer. Okay, D.C. Super. isn't a "state" court, but you know what I mean.

Finally, the FCC has ruled that telephone calls using AI-generated voices are "artificial" for the purposes of the Telephone Consumer Protection Act's restrictions on robocalling.

C. Professional Speech

Nothing to report this issue.

D. Threats, Harassment, and Incitement

A Louisiana man arrested for making a zombie apocalypse joke on Facebook in COVID-era America received a jury award of $205K in his W.D. La. First Amendment lawsuit.

An Ohio appeals court upheld a no-contact order issued against a persistent suitor on Facebook who didn't take no for an answer and used a fake account to evade a block. Meanwhile, a Massachusetts appellate panel held that Facebook posts intended to harm a plaintiff's reputation and cause emotional distress" are not the kind of "harassment" that can be enjoined under the commonwealth's anti-harassment law.

V. Infrastructure

A. Accessibility, Affordability & Discrimination

The Supreme Court denied cert in *Facebook v. Vargas* out of the Ninth Circuit, on the question of whether the *Iqbal*/*Twombly* standard applies to allegations supporting Article III standing in a case alleging that (now defunct) advertising tools violated the Fair Housing Act.

ISPs headed to the D.C. Circuit in March to challenge the FCC's new digital discrimination rules, which prohibit both intentional discrimination but also disparate impact without intent to discriminate. The City of Los Angeles has also passed an ordinance prohibiting ISPs from discriminating against low-income communities by offering slower or more expensive services.

B. Antitrust

I'm going to go out of order a bit to lead off with the biggest story in this section, namely, the new DOJ/state AG lawsuit in D.N.J. against Apple. In a lengthy pleading, the governments allege that the company has attempted to lock users into its iPhone "platform and ecosystem" by compelling them to use its payment system. The Verge has both an explainer and an analysis of the strategy behind the narrative tone of the DOJ complaint.

Moving on, the Supreme Court denied an application for a writ of injunction in *Coronavirus Reporter v. Apple* out of the Ninth Circuit, which involves an antitrust claim over the removal of an app from the App Store.

We have lots going on with Google and Apple in N.D. Cal. in this issue. In the fight between Epic Games and Google over the latter's Play Store, negotiations stalled about how Google could resolve Epic's issues following Epic's jury trial win last December, and Google's post-trial motions to flip the verdict were denied. In Epic's parallel lawsuit against Apple over the App Store, Epic sought a contempt order alleging that Apple had failed to comply with the terms of a 2021 injunction requiring the Apple to let developers direct users outside the App Store to pay for content. In a consumer lawsuit over the App Store, the judge certified a class of users and

denied Apple's *Daubert* motion to exclude expert testimony. In a hearing in the state AGs/consumers lawsuit against Google over the Play Store, the judge expressed skepticism as to whether a proposed $700M settlement was adequate. Google and Apple both escaped a lawsuit alleging that an agreement between Google and Apple impaired the quality of Google Search results. And in a another case over an alleged agreement between Apple and Google to split the search and digital advertising markets, claims against Apple were dismissed while Google's motion to compel arbitration was granted.

Elsewhere in N.D. Cal., a judge denied LinkedIn's motion to dismiss a subscriber lawsuit arguing that the company uses a monopoly over professional networking to jack up its prices, and adult entertainment performers moved to dismiss their lawsuit alleging that Meta Platforms conspired with the company behind OnlyFans to kill competitor sites.

A judge in S.D.N.Y. trimmed advertiser antitrust claims against Google, finding the plaintiffs "have not plausibly alleged antitrust standing in the markets for ad-buying tools used by large advertisers, but … plausibly allege antitrust standing as to injuries they purportedly suffered from anti-competitive practices in the ad-exchange market and the market for small advertisers' buying tools." Okay then. In the same court, Google was not so lucky in a case over its alleged use of its market power to force the deprecation of Adobe Flash in favor of HTML5, which a judge refused to dismiss. Also in S.D.N.Y., a case against Amazon and five major publishers over eBook pricing was cut down, with the publishers dismissed from the case entirely and the plaintiffs limited to two individuals who directly purchased eBooks from Amazon.

A judge in E.D. Va. set a jury trial in the DOJ's lawsuit against Google over its alleged dominance of the digital advertising market to begin on September 9.

The SEC approved the merger of Digital World Acquisition, a special purpose acquisition company, and Trump Media and Technology Group, the company behind platform Truth Social.

Finally, antitrust enforcement agencies both here and abroad have voiced concerns about getting a handle on the generative artificial intelligence market before it coalesces and corrective action is made more difficult by entrenched practices. Which sounds to me like they want to take action before there's any actual evidence of an antitrust violation, but what do I know?

C. Net Neutrality & Data Throttling

If you've been following this issue, you know that we'll have some major developments to report in this section next month. For now, I'll leave you with some scholarly commentary on the relationship between the Supreme Court's reconsideration of the *Chevron* doctrine and the *Brand X* decision that resulted in the FCC's flip-flopping on the status of internet service providers under federal law.

D. Domain Name System

Nothing to report in this issue. And thank goodness; when there are legal developments that directly implicate the domain name system, I break out in hives.

E. Taxation & Compelled Payments

Streaming services continue to romp through the courts, shutting down attempt after attempt by municipalities to impose cable-style franchise fees. This month, we have streamer wins in the Third Circuit and the appellate courts of California and Texas. We've also got a Colorado state judge who seems likely to reject state sales taxes on streaming.

In other news, a new bill in Illinois would impose taxes on tech companies for linking to, sharing, or displaying content from news organizations. Sigh.

F. Wire & Wireless Deployment

The FCC has revised its broadband speed standards for the first time in almost ten years, with a new standard of 100Mbps down/20Mbps up.

A small ISP in Ohio has been fined a comparatively small $10K for lying to the FCC about the reach of its fiber services.

G. Artificial Intelligence

Okay, what to do with this section? I can only cover a curated selection of news reports here, which frankly bugs me given my completist tendencies. I shunt off stories to other sections like Intellectual Property and Privacy when it makes sense, but even so this topic is getting very long. I expect it will settle down eventually, but until then I'm going to be doing link roundups. Don't worry – if there's anything that demands further discussion, I'll write more about it.

Government Regulation

- House punts on AI with directionless new task force, *TechCrunch*
- Congressional Witness Claims ChatGPT Won't Write Poems Praising Jim Jordan; Ranking Member Submits A Bunch Of ChatGPT-Authored Poems Praising Jim Jordan, *Techdirt*
- A.I. Leaders Press Advantage With Congress as China Tensions Rise, *New York Times*
- AI chatbots should pay for news, bipartisan Senate group says, *Roll Call*
- This agency is tasked with keeping AI safe. Its offices are crumbling., *Washington Post*

- DOJ Warns Using AI in Crimes Will Mean Harsher Sentences, *Security Boulevard*
- Regulators Need AI Expertise. They Can't Afford It, *Wired*
- States clash over what responsible AI looks like, *Route Fifty*
- In Big Tech's backyard, California lawmaker unveils landmark AI bill, *Washington Post*
    - Can California show the way forward on AI safety?, *Vox*
- UN adopts first global artificial intelligence resolution, *Reuters*

Deepfakes

- D.N.H.: New Hampshire voters sue Biden deepfake robocall creators, *NBC News*
    - Complaint: *League of Women Voters of N.H. v. Kramer*
- S.D.N.Y.: Firm Can't Drop Snoop Dogg Robocall Suit Like It's Hot, *Law360*
    - Order: *Martin v. Bottom Line Concepts*
- Tech giants sign voluntary pledge to fight election-related deepfakes, *TechCrunch*

Ethics & Content Policies

- Freedom of Expression in Generative AI: A Snapshot of Content Policies, *Future of Free Speech*
- OpenAI holds back wide release of voice-cloning tech due to misuse concerns, *Ars Technica*
- OpenAI forms a new team to study child safety, TechCrunch
- Cal. Super.: Elon Musk sues OpenAI over AI threat, *Courthouse News*
    - Complaint: *Musk v. Altman*
    - Elon Musk's legal case against OpenAI is hilariously bad, *The Verge*

Legal Industry

- Mass. Super.: $2000 Sanction in Another AI Hallucinated Citation Case, *Volokh Conspiracy*

  - Order: *Smith v. Farwell*

- Mo. App.: ChatGPT caselaw will cost you, *Courthouse News*
  - Opinion: *Kruse v. Karlen*
- S.D.N.Y.: Don't Give Me That ChatGPT-4 Nonsense, Judge Says, *Volokh Conspiracy*
  - Order: *J.G. v. N.Y.C. Dept. of Education*
- S.D.N.Y.: Judge declines to sanction Michael Cohen, lawyer over AI-generated fake case citations, *The Hill*
  - Opinion: *United States v. Cohen*
- AI Use in Law Practice Needs Common Sense, Not More Court Rules, *Bloomberg Law*

News Industry

- Artificial Intelligence in the News: How AI Retools, Rationalizes, and Reshapes Journalism and the Public Arena, *Columbia Journalism Review*
- AI adoption in newsrooms presents "a familiar power imbalance" between publishers and platforms, new report finds, *Nieman Lab*
- Google's Gen AI Search Threatens Publishers With $2B Annual Ad Revenue Loss, *Adweek*
- News Corp. CEO Jabs at New York Times OpenAI Lawsuit: 'Courtship is Preferable to Courtrooms', *The Wrap*
- Microsoft, pushing generative AI in newsrooms, partners with Semafor, CUNY, the Online News Association, and others, *Nieman Lab*
- OpenAI partners with Le Monde and Prisa Media, *AFP*
- Google Is Paying Publishers to Test an Unreleased Gen AI Platform, *Adweek*
- Here's How Google's Generative AI for Newsrooms Product Will Work, *Big Technology*
- Most big legacy news publishers across 10 countries are blocking OpenAI's crawlers, report finds, *Nieman Lab*

- Revealed: Which of the top 100 UK and US news websites are blocking AI crawlers, *Press Gazette*
- Politico embraces generative AI web crawlers with website redesigns, *Press Gazette*
- San Francisco Chronicle tries an AI chatbot — er, Chowbot — for food recs, *Nieman Lab*
- AI news that's fit to print: The New York Times' editorial AI director on the current state of AI-powered journalism, *Nieman Lab*
- NYT plans to debut new generative AI ad tool later this year, *Axios*
- An update on the BBC's plans for Generative AI (Gen AI) and how we plan to use AI tools responsibly, *BBC*
- Financial Times tests an AI chatbot trained on decades of its own articles, *The Verge*
- Wikipedia No Longer Considers CNET a "Generally Reliable" Source After AI Scandal, *Futurism*
- Former Twitter engineers are building Particle, an AI-powered news reader, *TechCrunch*
- A celebrity dies, and new biographies popup overnight. The author? A.I., *New York Times*
- A new AI-powered tool can help journalists detect audio deepfakes in Spanish, *Nieman Lab*
- Analysts Warn of Spread of AI-Generated News Sites, *VOA*

Entertainment Industry

- How AI Could Disrupt Hollywood, *Vanity Fair*
- AI companies are courting Hollywood. Do they come in peace?, *Los Angeles Times*
- AI's New Job? All-Purpose Hollywood Crewmember, *Hollywood Reporter*
- After the launch of OpenAI's Sora, can Hollywood adapt to the artificial intelligence 'matrix'?, *Los Angeles Times*
    - Tyler Perry Puts $800M Studio Expansion on Hold After Seeing OpenAI's Sora: "Jobs Are Going to Be Lost", *Hollywood Reporter*

- For Voice Actors, the Race Against AI Has Already Begun, *The Wrap*
- Disney harnesses AI to drive streaming ad technology, *Reuters*

Technological Development

- OpenAI introduces Sora, its text-to-video AI model, *The Verge*
- OpenAI experiments with giving ChatGPT a long-term conversation memory, *Ars Technica*
- Google releases GenAI tools for music creation, *TechCrunch*
- Google launches an AI-powered image generator, *TechCrunch*
- Adobe's Very Cautious Gambit to Inject AI Into Everything, *Bloomberg*
- The AI wars heat up with Claude 3, claimed to have "near-human" abilities, *Ars Technica*
    - Anthropic's Claude 3 causes stir by seeming to realize when it was being tested, *Ars Technica*
    - This AI says it has feelings. It's wrong. Right?, *Vox*
- Largest text-to-speech AI model yet shows 'emergent abilities', *TechCrunch*
- The text file that runs the internet, *The Verge*
- Reddit Signs AI Content Licensing Deal Ahead of IPO, *Bloomberg*
- Google CEO calls AI tool's controversial responses 'completely unacceptable', *Semafor*

H. Blockchain, Cryptocurrency, & NFTs

In a joint report on the intellectual property questions raised by non-fungible tokens, the USPTO and the Copyright Office reviewed a range of topics but advised Congress against alterations to IP law or policy

This probably could have been in Defamation, but it's really about the merits of a cryptocurrency issuer rather than the merits of his lawsuit. In a move that only Quark would love, the creator of crypto token "Bitcoin Latinum" sued tech reporter journalist Cyrus Farivar in Del. Ch. over an article published by Forbes, in which Farivar reported on a prior lawsuit against the plaintiff. Among other things, Farivar debunked a statement, alleged in the prior complaint to have been made by the plaintiff, that the token was supported financially by the producers of *Star Trek*. It's

a pretty straight-up fair report privilege case, I think, but I'm not one to pass up a *Star Trek* reference.

Whether Sonny Estival a/k/a Mason Rothschild is a "straightforward swindler" or an NFT artist is, I suppose, a matter of opinion. But after a jury in S.D.N.Y. unequivocally declared him the former in a trademark lawsuit brought by my namesake fashion house over Estival's "MetaBirkins" NFTs, the judge in the case denied Estival's motion seeking a declaration that an injunction entered against him would not prevent him from accepting an invitation to display his NFTs as part of a Swedish art exhibition. Estival has sought reconsideration of the order.

VI. Government Activity

A. Data Surveillance, Collection, Demands, and Seizures

Republican attempts to reauthorize Section 702 of the Foreign Intelligence Surveillance Act before it sunsets ran into problems in February; specifically, the FBI's abuse of the surveillance law to sweep up data on Republicans during the Carter Page investigation led to infighting in the Republican camp. Meanwhile, the White House is asking the Foreign Intelligence Surveillance Court for a one-year reauthorization of surveillance activities to extend its powers past the April 19 sunset date. [LATE UPDATE: In April, shortly before the deadline, the House voted to reauthorize Section 702 for two years with certain amendments – but not including the warrant requirement that many privacy and civil liberties advocates wanted.]

In the prosecution of a woman involved in protests against a new police training center, Georgia's Attorney General's Office has taken the position that the possession of a basic cellular phone without smartphone capabilities is evidence of intent to participate in an illegal conspiracy under Georgia's RICO law. Think about that one for a minute; I'll be outside screaming.

A Michigan appeals court held that a warrant to search a smartphone violated the First Amendment because it was not limited to the apps and filetypes in which the government had reason to believe it could find the evidence sought. Prof. Orin Kerr has concerns about the court's result, arguing that the whole phone should be subject to search but that the government's use of non-responsive data should be limited under the Fourth Amendment. Interesting stuff.

The FBI wants in on that sweet, sweet AI action, engaging Amazon's image analysis service Rekognition "to extract information and insights from lawfully acquired images and videos." Meanwhile, we've learned that the feds demanded that Google identify all account holders who watched certain YouTube videos during eight days in January 2023.

B. Encryption

Nevada's AG ran into state district court in February seeking a temporary restraining order to bar Meta Platforms from implementing end-to-end encryption on its messaging services, a request

couched in substantial nonsense about harm to kids and deceptive trade practices. Meta's opposition dismantles the state's motion briefly but handily, and the judge didn't bite, but the court did schedule a hearing in March. Plenty of amici used the additional time to explain why the AG's move is bonkers.

C. Biometric Tracking

Perhaps nothing to report in this issue -- but see the story above about the FBI's use if Rekognition, which does have face-comparison features that law enforcement is prohibited from using for criminal investigations. Anyone want to place odds on whether we'll learn a year from now that the FBI is abusing access to the tool?

D. Domain Seizure

So, an international law enforcement coalition seized websites associated with the infamous LockBit ransomware group. Then the cops got a bit cocky, announcing the takedown on LockBit's own leak site and using that site to leak information about LockBit itself. But it turns out that LockBit was a bit more resilient than law enforcement expected, with an administrator for the group slipping through the net and launching a new leak site on the dark web with new victims. Oops.

In other news, we've got another ransomware gang "faking its own death" by posting a fraudulent FBI domain seizure notice on its website after ripping off a co-conspirator.

E. Social Media Posts & Blocking

The Supreme Court issued its decision in *Lindke v. Freed*, involving the question of when a public official is engaged in state action when blocking a constituent or removing their content on social media. The Court announced a new two-part test, namely that the defendant must have "(1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media."

As I explained in a recent article in the *MediaLawLetter*, the case is interesting both because it analyzes how the specific blocking mechanisms of a social media affect the state action question and for its place in the broader theme of government activity with respect to social media considered by the Court this Term. (You might also recall that *Lindke* had a companion case, *O'Connor-Ratcliff v. Garnier*; the Court issued a per curiam opinion in that case vacating the Court of Appeals decision and remanding for the lower court to follow *Lindke*.)

Meanwhile, in the case of a University of Oregon employee who was blocked from the school's @UOEquity Twitter account by the Communication Manager for the University's Division of

Equity and Inclusion, the Ninth Circuit vacated a district court order denying a preliminary injunction against the Communications Manager to require the plaintiff to be unblocked.

F. Prior Restraint

A judge in S.D.N.Y. rejected a defendant's motion to compel the New York Post and online legal tracking websites to remove information about his case as "blatantly violat[ing] the First Amendment," and found that even interpreting the motion as one to seal the record would still fail as violative of the public's right of access.

Without reaching First Amendment issues, an Indiana appellate panel reversed a trial court injunction barring a social media poster from continuing to hound a high-school sophomore who posted a video of himself using a racist term, finding that the judge did not have the authority under state law to issue the order sua sponte.

A New Jersey appellate panel heard argument at the tail end of January on whether Daniel's Law can be constitutionally applied to prosecute a journalist who publishes the home address of a police official. (The case involved disclosures at a city council meeting, but I'm including the case here because this kind of thing often happens online.)

G. Online Access to Government Information

Once again, the question is asked, why doesn't the Supreme Court stream argument video? And it's a good one. Another good question is why broadband maps created by a private vendor under an eight-figure FCC grant are paywalled.

I'll end with a modest "woo-hoo" from yours truly, as a judge in D.D.C. approves a $125 million settlement over PACER fees. Please make out the check to Media Law Resource Center, Inc..

VII. Global

A. International

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- International cybercrime malware service targeting thousands of unsuspecting consumers dismantled, *Europol*

B. Europe

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- TikTok's attempt to stall DMA antitrust rules rejected by EU court, *The Verge*
- Apple won't be forced to open iMessage to rivals, EU decides, as it also lets three Microsoft services off DMA hook, *TechCrunch*
- EU AI Act secures committees' backing ahead of full parliament vote, *TechCrunch*
- ECHR: Backdoors that let cops decrypt messages violate human rights, EU court says, *Ars Technica*
    - Judgment: *Podchasov v. Russia*
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    - Europe's Digital Services Act applies in full — here's what you need to know, *TechCrunch*
- Apple disables iPhone web apps in EU, says it's too hard to comply with rules, *Ars Technica*
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J. France

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HH. Uganda

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II. Ukraine

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KK. Vietnam

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VIII. Miscellaneous

The Sixth Circuit held that a voter who wished to post a ballot selfies had standing to challenge two Ohio laws prohibiting the display of a marked ballot.

The Seventh Circuit held that, under *Holder v. Humanitarian Law Project* (one of my least favorite decisions, because the Supreme Court got all deferential to the executive when nominally applying strict scrutiny), the conviction of a computer programmer for providing material support to a terrorism organization via software was consistent with the First Amendment. Along the same lines, there's a question of whether X violated U.S. sanctions law by requiring payment for the blue checkmarks on accounts operated by Hezbollah and other sanctioned entities; the checkmarks predated Musk's acquisition of Twitter, but the financial aspect came afterwards.

On remand from the Supreme Court and pursuant to an order of the Tenth Circuit, a judge in D. Colo. entered a detailed final judgment in *303 Creative v. Elenis* stating how the First Amendment protects the wedding website creator in the case and what the state is not allowed to do as a result.

A new lawsuit in W.D. Wash. accuses Amazon of deceptive practices in charging annual subscribers additional fees for ad-free streaming on Prime Video when they had already paid for a year of ad-free streaming under the prior deal. In other Amazon news, the U.S. Consumer Product Safety Commission is expected to release an order soon that could classify Amazon's retail marketplace as a distributor of goods for the purposes of consumer safety regulations, imposing greater responsibility for the safety of third-party products.

The White House released "President Biden's Unity Agenda for the Nation" in March, which contains a fair amount of tech-bashing (including some slams at Section 230) and not a whole lot of sense. Meanwhile, the administration seems to be looking for a way around an Espionage Act prosecution of Julian Assange. As mentioned above, a UK court delayed Assange's extradition, and he will be allowed to pursue an appeal of his extradition in the UK unless the U.S. provides assurances in short order that Assange can invoke the First Amendment in his defense and would not be subject to the death penalty.

* * *

That's all for now. Not sure if I'll squeeze in another issue before the *Legal Frontiers* conference (did I mention that you should register ASAP?), but we'll see what we can do – and if not, then I'll talk to you all in person in San Francisco!

Jeff Hermes is a Deputy Director with the Media Law Resource Center. He is a Friday's child, which means that he was originally "full of woe," but apparently managed to stick Wednesday's kids with that fate in later versions of the poem. He would like to remind you that he did warn you on page 29 about the Star Trek *references.*